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No. 90-1544

In The

Supreme Court of the United States

October Term, 1990

ELBERT L. HATCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER

– AND –

AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER, ELBERT L. HATCHETT

NOW COMES FEDERAL CRIMINAL DEFENSE ASSOCIATION OF MICHIGAN and THE NATIONAL BAR ASSOCIATION, by and through their duly authorized representatives and moves this Honorable Court for Leave to File an *Amicus Curiæ* Brief in Support of Petitioner, Elbert L. Hatchett, upon the following grounds and reasons:

1. One of the questions presented by this appeal is whether or not the ruling of the trial judge that precluded the Petitioner from establishing a necessary element of his advice of counsel defense, that he made a full disclosure to his attorney before receiving the advice relied upon by him, violated Petitioner's 5th and 6th Amendment rights and, of particular interest to the Petitioner's *Amicus Curiæ*, abrogated the long-standing defense to crimes involving

proof of wilfulness of one's good-faith reliance upon the advice of counsel.

2. Permission has been sought by both the above-named organizations from the United States Attorney's Office for the Eastern District of Michigan, to file an *Amicus Curiæ* Brief herein and we were advised by Assistant United States Attorney, Kathleen Moro Nesi on May 3, 1991, that it was her belief that the file had been turned over to the Solicitor General's Office and that the Solicitor General was the proper person from whom to seek concurrence. On that same date concurrence was sought from Assistant to the Solicitor General, Ronald Mann, on behalf of both organizations, and he advised that he did not have the authority to concur at this time..

3. That THE FEDERAL CRIMINAL DEFENSE ASSOCIATION OF MICHIGAN is an organization consisting of lawyers who are members of the Michigan Bar Association and who practice primarily in the Federal Courts of Michigan and who have specialized in the area of criminal law.

4. That THE NATIONAL BAR ASSOCIATION is an organization of lawyers, judges and law faculties/administrators throughout the country with a membership in excess of 12,000; many of whom confine their practices exclusively to criminal law.

5. That the resolution of the issue presented in the case of *Elbert L. Hatchett* vs. *United States of America* is extremely important to the jurisprudence of all of the states in the 6th Circuit and is further important to the jurisprudence of the United States in that it will have a fundamental impact upon the counseling role of criminal defense attorneys throughout the country.

6. That the decision of the courts below in the instant case makes it impossible for attorneys to render usable advice to clients on important prospective matters and

therefore the counseling role of the attorney affords a well-intentioned client no protection whatsoever from criminal charges of wilful violation of the law. The decision below has therefore completely abrogated the defense of good-faith reliance upon the advice of counsel as a defense to criminal charges involving allegations of wilful violation of the law.

WHEREFORE, Petitioner prays that this Honorable Court will grant permission to file the attached *Amicus Curiæ* Brief in Support of the Petitioner, Elbert L. Hatchett.

By: _____

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DATED: May 5, 1991

QUESTION PRESENTED

WHETHER AN EVIDENTIARY RULING WHICH TOTALLY DEPRIVES A DEFENDANT OF HIS RIGHT TO PRESENT EVIDENCE TO NEGATE WILFULNESS IN AN ADVICE OF RIGHTS DEFENSE TO A SPECIFIC INTENT CRIME VIOLATES THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THIS IS THE ONLY DEFENSE TO THE CHARGE.

PARTIES

The Petitioner in this Court is Elbert L. Hatchett, who was the defendant in the proceedings below. Respondent is the United States of America. The Federal Criminal Defense Lawyers of Michigan and the National Bar Association appear as *Amicus Curiæ*, in support of Petitioner Elbert Hatchett.

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AMICUS CURIE BRIEF IN SUPPORT OF PETITIONER, ELBERT L. HATCHETT

THE FEDERAL CRIMINAL DEFENSE LAWYERS OF MICHIGAN and THE NATIONAL BAR ASSOCIATION respectfully pray that a Writ of Certiorari issue to review the opinion and Judgment of the Sixth Circuit Court of Appeals entered in this Proceeding on November 7, 1990.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported *sub nom United States of America v. Elbert L. Hatchett*, 918 F.2d 631, *reh'g den'd.* ___ F.2d ___, (6th Cir. 1991) and is reprinted in the Appendix to the Petition for Writ of Certiorari at 1.

The Opinion of the United States District Court for the Eastern District of Michigan, which is not reported, is set out in the Appendix to the Petition for Writ of Certiorari at 37.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on November 7, 1990. A timely motion for rehearing was denied on February 6, 1991. (App. 37) The Petition was filed within 60 days of the order denying rehearing.

The jurisdiction of this Court to review the Opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, and Rules 801 and 401 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

The Statement of the Case included in the Petition for Writ of Certiorari filed by Petitioner is incorporated herein by reference as if fully set forth.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Summary of Reasons for Granting Petition for Writ of Certiorari

Certiorari should be granted because the Trial Court decision has created a conflict between the Fifth and Sixth Amendments of the United States Constitution and the Federal Rules of Evidence concerning hearsay. Certiorari should also be granted to resolve the irreconcilable conflict between the decision of the Trial Court and the rule of law articulated in this Honorable Court in *Williamson* v.

United States, 207 U.S. 425 (1908) and followed in every federal and state decision pronounced thereafter.

Attorneys and counselors throughout the Sixth Circuit are deprived of their ability to perform the counseling portion of their job by the ruling of the Court. Both corporate and individual clients rely upon our profession for pre-litigation interpretation of the law to be sure that their actions do not violate the law. The rule of law must be rational and articulable to protect those clients who have staked their compliance with the law on the advice of competent attorneys. After the decision of the Trial Court, affirmed by the Sixth Circuit, the only thing an attorney can ethically advise a client is that if all of the rules relating to advice of counsel are followed it provides no protection whatsoever against criminal prosecution because the evidence of compliance cannot be introduced before the jury.[1]

Moreover, the decision of the Lower Court renders it impossible for trial attorneys to ever present a meaningful defense for a client accused of a specific intent crime who acted in strict accordance with the advice of a competent attorney after full disclosure of all material facts to the attorney because the evidence of full disclosure has been ruled inadmissible in the Sixth Circuit.

I.

THE RULE OF LAW IN THE ADVICE OF COUNSEL DEFENSE REQUIRES PROOF OF FULL DISCLOSURE OF ALL MATERIAL FACTS TO A COMPETENT COUNSEL.

A defendant charged with Wilful Failure to Pay Taxes under 26 U.S.C. § 7203 can defend against the wilfulness element of the criminal charge by showing that he acted in

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[1] The impact of the decision in this case applied with equal validity to certified public accounts and accountants whose job it is to give advice on matters pertaining to the tax laws. Attorney Gertleson, in the instant case, was both an attorney and Certified Public Accountant.

strict accordance with the advice of a competent counsel that was given *after full disclosure of all material facts to the attorney*. *United States* v. *Eisenstein*, 731 F.2d 1540, 1545 (11th Cir. 1984).

As it was in the *Hatchett* case, this is often the only defense where the action taken proves in hindsight to be unlawful. Certainly, entities or persons attempting to comply with overwhelming federal and state regulations of business activity must regularly seek advice about proposed actions and generally have no other explanation for their actions other than that the actions were reviewed and cleared by their attorneys. The meetings where the actions are discussed with the attorneys are meetings generally attended only by the attorneys and the clients so that the confidentiality protected under the attorney/client privilege can be maintained.

II.

THE DISCLOSURES MADE TO AN ATTORNEY PRIOR TO OBTAINING ADVICE ARE PROHIBITED FROM DISCLOSURE TO A JURY AFTER THE DECISION IN *UNITED STATES* v *HATCHETT*.

The Honorable Judge of the Eastern District of Michigan ruled that the attorney from whom Hatchett obtained advice about payment of Hatchett's taxes was excluded from advising the jury at trial about the disclosures Hatchett made to the attorney before obtaining the advice. App. 64 The Court ruled this evidence to be hearsay, but later admitted that the evidence *would have been admissible to show the full disclosure element of the advice of counsel defense*. App. 41; 64 Counsel for Hatchett had sought to admit the evidence for *exactly that purpose of showing full disclosure* and had been denied that introduction of evidence by the Court during trial. App. 64

The diabolical nature of this ruling is masked by the simplicity of calling the evidence hearsay. If two people are

in a room and one of them says something to the other, how can the statement ever be introduced into evidence if the statement is not against the interest of the party seeking to introduce it? But yet it must be introduced if a defendant is to show full disclosure as part of an advice of counsel defense.

Pursuant to F.R.E. 801(c), the statement is hearsay as to both of the people in the room. No distinction is made in the rule for whether the declarant is the defendant or some other witness. When Gettleson was asked what Hatchett told him, an objection to any answer was sustained on the basis of hearsay. In so doing, the Court implicitly concluded that the statement was being offered to prove the truth of the facts stated by Hatchett, and not simply to prove that Hatchett told Gettleson these facts whether they were true-or not. The Trial Court recognized this when it later changed its position when ruling on the bond motion by stating that it might have admitted the statements for the limited purpose of showing disclosure.

Although Hatchett contends that the Trial Court was in error in its conclusion that the evidence sought from Gettleson was for any purpose other than to show disclosure, assuming *arguendo* that the Court was correct on this point, then *Hatchett would not have been allowed to testify to what he told Gettleson either.*

The information that Hatchett told Gettleson was not information that had been stated under oath during the Hatchett trial, or in any trial or hearing for that matter. These conversations took place in 1979 and 1980 — a full nine years before the trial and during the privacy of an attorney/client conference. *The statements were hearsay out of Hatchett's mouth just as they would have been out of Gettleson's.*

The only possible exception to this inescapable conclusion is not applicable in this case, but is found in F.R.E. 801(d)(1). This rule declares certain statements by a declarant not to be hearsay and states:

> PRIOR STATEMENT BY WITNESS: A statement is not hearsay if:
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement *and* the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) *consistent* with the declarant's testimony *and is offered to rebut an express or implied charge against the declarant of* recent fabrication or improper influence or motive, of (C) one of identification of a person made after preceiving the person.
>
> (Emphasis supplied).

In Hatchett's trial, there was no claim of recent fabrication because the lawyer himself testified that his advice was sought and documentary evidence established that Hatchett had advised the IRS in writing on March 17, 1983 that he was continuing to withhold payment of the tax *based upon the advice of his accountant and lawyer.* App. 78 Nor was there a claim of a prior inconsistent statement. It must be assumed that Hatchett's statement of what he told Gettleson would in fact have been consistent with the known facts already divulged by the government's witnesses during the government's case-in-chief. The issue in Hatchett's trial was the fullness of the disclosure.

If Hatchett took the stand, his attempt to disclose the content of what he told Gettleson to satisfy his burden of

showing full disclosure would come during his direct examination by his lawyer. At this time, there would not have been any "express or implied charge" for Hatchett to rebut. Such a charge, if ever made, would only come during cross-examination. Thus, whereas any statement Hatchett made during direct examination regarding his conversations with Gettleson would have been properly objectionable by the government on hearsay and self-serving grounds, *Hatchett could never advise the jury of his prior consistent statements to Gettleson in 1979 and 1980 to prove the truth of the facts he told Gettleson unless and until the government chose to attack him under F.R.E. 801(d)(1) during cross-examination.*

The rule of prior consistent statements as substantive proof of the facts contained in the statements is one that requires the adverse party to "open the door" on cross-examination by challenging the veracity of the declarant under F.R.E. 801(d)(1)(B). If, as the Trial Court and the Majority Opinion of the Sixth Circuit suggest, Hatchett is required to prove full disclosure by offering into evidence statements "for the truth" contained therein, *the only way that any defendant can ever sustain a defense of advice of counsel would be for the government to let it happen.* Surely this is not what this Honorable Court meant when it stated that a defendant must be allowed the fundamental right to present a defense. *Chambers* v. *Mississippi*, 410 U.S. 284 (1983).

Eisenstein, *supra*, concluded that statements regarding disclosure were admissible for the purpose of proving full disclosure when advice of counsel was interposed as a defense to a specific intent crime. Any other result defeats the due process right of a defendant to present a meaningful defense at trial. *Chambers* v. *Mississippi*, *supra*.

The conclusion in *Eisenstein*, *supra*, is in accord with every reported federal and state decision on this issue prior to the *Hatchett* case. *United States* v. *McLennan*, 563 F.2d

943 (9th Cir. 1977), *cert. denied*, 435 U.S. 969, 985 (1978); *Matter of Patterson*, 70 B.R. 124, 131 (W.D. Mo. 1986); *Salem v. Kamberos*, 206 Ill. App.3d 686, 565 N.E.2d 6, 11-13 (1990); *Morin v. Mineau*, 112 Me. 471, 473, 92 A. 527, 528 (1917); *Tate v. Connel*, 3 Ariz. App. 534, 416 P.2d 213 (1979).

III.

THE GETTLESON TESTIMONY WAS RELEVANT TO HATCHETT'S DEFENSE.

The Trial Court, and the Majority Opinion of the Sixth Circuit, concluded that the relevance of the Gettleson testimony regarding disclosures made by Hatchett to Gettleson was dependent upon the jury believing the *truth* of what Gettleson testified to at trial and was therefore inadmissible as hearsay. App. 14; 41 This conclusion was erroneous because it is not the province of the jury to decide relevance at all. It is the duty of the Court to decide whether testimony has the tendency to make the existence of a fact of consequence to the determination of an action more or less probable and to admit that evidence which has such a tendency. F.R.E. 401.

In Hatchett's case, no evidence was more relevant than evidence tending to show whether he was wilful in failing to pay taxes. The act of failing to pay was uncontested and the defense hinged upon *mens rea*. The only evidence of Hatchett's state of mind, however, was withheld from the jury. By withholding this evidence from the jury, Hatchett was prevented from presenting his version of the facts to the jury, and indeed, the jury was left with no evidence whatsoever about Hatchett's state of mind. Such a result has led this Honorable Court to state in *Washington v. Texas*, 388 U.S. 14, 19 (1967) that:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain

> terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of Due Process of Law.

The Trial Court committed error of constitutional proportions when it failed to accord Hatchett the *fundamental right* to present the testimony of Gettleson in Hatchett's defense. *Chambers* v. *Mississippi*, *supra*, 410 U.S. at 302.

The Trial Court should have admitted Gettleson's testimony regarding disclosures made by Hatchett because the testimony was not only relevant but was in fact crucial to Hatchett's defense. The jury would then determine what weight to give the testimony based upon its evaluation of the evidence against all of the other evidence in the record.

CONCLUSION

The decision of the Trial Court in the *Hatchett* case makes it impossible for attorneys to render advice to clients on important prospective matters because that advice is no protection whatsoever in the Sixth Circuit against a charge of wilful violation of the law. The decision also prevents trial counsel from ever presenting the advice of counsel defense to a jury at trial. The rule of law has been significantly changed in the Sixth Circuit in such a manner as to defeat the best efforts of lawful entities and individuals to determine in advance that their prospective actions comport with the law and also renders them vulnerable to a hindsight determination that their actions *based on competent legal advice after full disclosure of facts* violated the law. The decision violates the unbroken line of precedent in both federal and state jurisdictions that have considered

the issue. The decision should be overturned as a violation of fundamental constitutional protection.

Respectfully submitted,

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DATED: May 6, 1991

APPENDIX

• • •

The Appendix attached to the Petition for Writ of Certiorari filed by Petitioner is incorporated herein by reference as if fully set forth. All references herein to the Appendix refer to said Appendix.